Date: November 20th, 2000
Docket: S.H. 162867

2000

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as George Eddy Company v. Annapolis County (Municipality), 2000 NSSC 2
BETWEEN:

GEORGE EDDY COMPANY LIMITED

APPLICANT

- and -

MUNICIPALITY OF THE COUNTY OF ANNAPOLIS and ALBERT M. DUNPHY, Development Officer for the Municipality of the County of Annapolis

RESPONDENTS

DECISION

HEARD: **in Special Chambers at Halifax, before the Honourable Associate Chief Justice Michael MacDonald**

ORAL DECISION: **July 6, 2000**

DATE OF WRITTEN DECISION: **November 20th, 2000**

COUNSEL: **Robert G. Grant, Q.C. & J. Scott Barnett Stewart McKelvey Stirling Scales for the Applicant**

W. Bruce Gillis, Q.C., Durland Gillis Parker & Richter for the Respondents

[1] The Applicant land developer after applying for but failing to receive final subdivision approval looks to the Court for relief including:

a. An order in the nature of *certiorari* quashing the development officer's decision that the application was incomplete,

b. A declaration that the application is in fact complete, and

c. An order of *mandamus* directing the development officer to issue the final approval.

BACKGROUND

[2] The facts are neither complicated nor in dispute. The Applicant owns a large tract of land surrounding Lower Lake Sixty in Annapolis County. In the summer of 1996, the Applicant began the process of first consolidating and then subdividing this land into approximately 25 lots. The Applicant applied for tentative subdivision approval in October of 1997 and received the same

on March 16, 1998. Shortly thereafter in April of 1998, the Municipality passed a new subdivision by-law requiring higher road standards.

[3] After several initial attempts the Applicant submitted its last plan for final approval on March 14, 2000. The next day, the application was determined by the development officer to be incomplete for essentially two reasons:

1. It failed to meet the newly incorporated road standards, and

2. one of the bearings on the plan was missing.

[4] While the missing bearing on the plan was and is of no great consequence, the requirement to meet the new road standard represented a major obstacle for the Applicant. It means a much more expensive road construction process. The Applicant takes the position that because it received tentative approval before the new road standard was incorporated, its application should be grand-parented and it should only have to meet the road standards as they existed at the time it received the tentative approval. The Applicant, therefore, takes

issue with the development officer's decision to declare the application incomplete and looks to this Court for relief.

THE *CERTIORARI* APPLICATION

(i) The Scope of Judicial Power

[5] I will deal with the *certiorari* application first. My analysis begins with the scope of judicial review. The Applicant insists that as a matter of law it had a right to have the final approval granted without meeting the higher road standards. The Applicant relies on the grand-parenting section of the new *Municipal Government Act*. Section 283 is the relevant provision. It states:

> Tentative plan of subdivision
>
> 283 Where a tentative plan of subdivision is approved pursuant to the subdivision by-law, a lot or lots shown on the approved tentative plan shall be approved at the final plan of subdivision stage, if
>
> (a) the lots are substantially the same as shown on the tentative plan;
>
> (b) any conditions on the approval of the tentative plan have been met;

> (c) the services to be constructed have been constructed and accepted by the municipality or acceptable security has been provided to the municipality to ensure the construction of them; and
>
> (d) the complete application for final subdivision plan approval is received within two years of the date of the approval of the tentative plan. 1998, c. 18, s.283

[6] The Applicant submits that it met all applicable conditions of s. 283 and therefore submits that the plan "shall" be approved. The development officer has a different interpretation. In any event, the Applicant insists that because this entire case involves the interpretation of a piece of legislation, it is a pure question of law commanding no deference to the development officer. The Municipality agrees that this exercise involves essentially a question of law, but submits that given the nature of the *Act* and the development officer's presumed expertise, certain deference should be paid to his interpretation. I agree with the Applicant on this point. Applying the guidance of Bastarache, J. in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration),*** [1998] 1 S.C.R. 982, the development officer's decision in the circumstances of this case is on the low end of the deference spectrum (being a decision involving statutory interpretation). The development officer's expertise would

not be extended into that area. I find the standard of review therefore to be that of correctness.

(ii) Merits of the Application

[7] The Applicant insists that s. 283 speaks for itself and the plan *shall* be approved if sub-clauses a, b, c, and d are met. I will now review the four criteria:

(a) the lots are substantially the same as shown on the tentative plan;

[8] Having reviewed these plans, I agree with Applicant and find that the lots are substantially the same as shown on the tentative plan.

(b) any conditions on the approval of the tentative plan have been met;

[9] I find that all conditions of any consequence have been met.

***(c) the services to be constructed have been constructed and accepted by the municipality or acceptable security has been provided to the municipality to ensure the construction of them*;**

[10] The Municipality submits that this provision speaks about municipal requirements at the time of final approval which would include the new road standards. The Applicant on the other hand submits that this subsection applies to services required at the time the tentative plan was approved. I agree with the Applicant on this issue. The subsection refers to the services "to be constructed". This speaks to the future and therefore can only apply to requisite services at the time the tentative plan was approved.

***(d) the complete application for final subdivision plan approval is received within two years of the date of the approval of the tentative plan*.**

[11] The Application in the case at bar was submitted just within the two year mark. According to the development officer it was a complete application subject to two requirements: (1) The failure to comply with the new road standards and, (2) the completion of one of the courses on one of the lots in the plan. The

second requirement appears to be, by all accounts, inconsequential. The first requirement is the very subject matter of this hearing.

[12] Having ruled in the Applicant's favour on this issue, I find therefore that all aspects of s. 283 have been met and the Applicant would have been entitled to final approval.

[13] In reaching this conclusion, I note the Municipality's reliance on s. 278 of the *Municipal Government Act* in its submission that the higher road standards are applicable to this Application. Specifically, the Municipality relies upon subsections 278(1), (2)(f) and (g) which provide as follows:

> (1) An application for subdivision approval shall be approved if the proposed subdivision is in accordance with the enactments in effect at the time a complete application is received by the development officer.
>
> (2) An application for subdivision approval shall be refused where
>
> > (f) the proposed subdivision does not meet the requirements of the subdivision by-law and no variance is granted; or
> >
> > (g) the proposed subdivision is inconsistent with a proposed subdivision by-law or a proposed amendment to a subdivision by-law, for a period of one

> hundred and fifty days from the publication of the first notice advertising the council's intention to adopt or amend the subdivision by-law.

[14] This brings into focus an apparent conflict between s. 283, *supra* and the above subsections of s. 278. I find when considering the context of the *Act* generally, s. 278 must be subject to the clear meaning of s. 283. I find that s. 283 represents the legislator's effort to protect developers exactly like the Applicant who received tentative approval under one regime and are to be protected from any subsequent changes.

[15] The development officer therefore erred in law in finding the application incomplete. This decision is therefore set aside. On the same basis, the Applicant is entitled to a declaration that the application for final subdivision is complete, (again subject to non-contentious error in the plan).

THE *MANDAMUS* APPLICATION

[16] The requirements for *mandamus* are exacting. Justice Rogers in *Rawdon Realties Limited et al* v. *Rent Review Commission* (1982), 56 N.S.R. (2d) 403 (S.C.T.D.), considered the prerequisites. At page 405 he stated:

> In order for *mandamus* to lie, or an order in the nature of *mandamus* to lie, there must be, first of all, standing, a sufficient legal interest in the parties making the application. There must also be no other legal remedy, equally convenient, beneficial and appropriate. Thirdly, there must be a duty to the Applicant by the parties sought to be coerced to do the act requested. Fourthly, the duty owed must not be one of a discretionary nature, but may be established at common law, or by statute. Fifthly, the act requested to be done must be required at the time of the application, not at some future date. Sixthly, there must be a request to do the act and that request must have been refused.

See also *Smith's Field Manor Development Limited* v. *Halifax (City)* (1988), 83 N.S.R. (2d) 29 (S.C.A.D.) at p.40, *Walsh* v. *Bedford (Town)* (1990), 95 N.S.R. (2d) 377 (S.C.T.D.) and *King* v. *Workers' Compensation Board (N.S.)* (1997), 163 N.S.R. (2d) 381 (S.C.).

[17] In applying this test to the facts of the case at bar there is essentially only one issue. That is whether or not there is another legal remedy "equally convenient, beneficial and appropriate".

[18] Specifically, under the *Municipal Government Act* an aggrieved person such as the Applicant, can appeal a refusal to grant a subdivision permit. Subsection 247(3) provides as follows:

> (3) The refusal by a development officer to
>
> > (b) approve a tentative or final plan of subdivision, may be appealed by the Applicant to the Board.

[19] It is significant that the right of appeal is from a *refusal*. Technically in the case at bar, the application was not refused it was simply declared incomplete. This is significant in light of s. 277 of the *Act* which gives the development officer his jurisdiction. Section 277 provides:

> (1) Within fourteen days of receiving an application for subdivision approval, the development officer shall

> (a) determine if the application is complete; and
>
> (b) where the application is incomplete, notify the Applicant in writing, advising what is required to complete the application.
>
> (2) A completed application for subdivision approval that is neither approved nor refused within ninety days after it is received is deemed to be refused, unless the Applicant and the development officer agree to an extension.
>
> (3) The development officer shall inform the Applicant of the reasons for a refusal in writing.

[20] Specifically subsection (3) contemplates a refusal by the development officer and that refusal being in writing.

[21] As stated in the case at bar, the decision of the officer was not a refusal. The development officer's response of March 15, 1998 is set out in Tab H of the Applicant's affidavit. It refers to s. 277(1)(b), noting specifically that the application was incomplete. It was therefore technically not a refusal.

[22] Furthermore under the *Municipal Government Act*, the Applicant's right to appeal is limited. Section 250(3) provides:

> (3) An Applicant may only appeal a refusal to approve a concept plan or a tentative or final plan of subdivision on the grounds that the decision of the development officer does not comply with the subdivision by-law.

[23] In the case at bar, the grounds of appeal would have to be broader and arguably not covered under s. 250(3).

[24] Furthermore, subsection 251(2) limits the Board's jurisdiction on appeal. It provides:

> (2) The Board shall not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.

[25] Thus even if the Board were to hear this matter by way of appeal, it might not have been able to grant appropriate relief.

[26] Furthermore, the mere existence of another potential remedy is not enough to deny *mandamus*. I take guidance from the decision of *Smith's Field Manor Development Limited v. Halifax (City)* 83 N.S.R. (2nd) [N.S.C.A.] where at

paragraph 57 Chipman, J.A. (after referring to the *Rawdon Realties Limited, supra)* noted at paragraph 57:

> It will be noted that it is not the total absence of another legal remedy which is requisite for *mandamus*, but the absence of another legal remedy which is equally convenient, beneficial and appropriate. It has been said that the court on review will weigh the character and competence of the alternative remedy to ascertain if it is sufficient and convenient in the true legal sense of these words. See *R.* v. *Minister of Finance*, [1935], S.C.R. 70, at 86.

[27] Therefore, given the aforesaid restrictions in the Applicant's right to appeal and after considering all the circumstances of this case, I find that no "equally convenient, beneficial and appropriate remedy" exists. Therefore, an order for *mandamus* is appropriate and I so order. Specifically, I direct the development officer to issue the final approval (subject only to the Applicant correcting the technical error in the plan).

Michael MacDonald
Associate Chief Justice